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APPENDIX A

U.S. COURT OF APPEALS
TENTH CIRCUIT
(DENVER)

No. 90-5231

DAVIES

v.

AMERICAN AIRLINES, INC.

July 13, 1992

Appeal from the U.S. District Court for the Northern District of Oklahoma. Reversed and remanded.

Gary G. Grisso (Joe L. White, with him on brief), Collinsville, Okla., for appellant.

Reuben Davis (Frederic N. Schneider III, Kimberly A. Lambert, and Boone, Smith, Davis, Hurst & Dickman, with him on brief), Tulsa, Okla. for appellee.

Before ANDERSON and EBEL, Circuit Judges, and ANDERSON, Senior District Judge.*

Full Text of Opinion

EBEL, Circuit Judge:—This appeal arises out of a claim, based upon Oklahoma law, for wrongful termination of employment in violation of public policy. *See*

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* The Honorable Aldon J. Anderson, Senior District Judge of the United States District Court for the District of Utah, sitting by designation.

Burk v. K-Mart Corp., 770 P.2d 24, 28-29 (Okla. 1989). Three issues are raised: First, is this state law action a "minor" dispute within the exclusive jurisdiction of an arbitral board under the Railway Labor Act ("RLA")? Second, does Oklahoma law provide a remedy for wrongful termination in violation of public policy where other remedies are available? Third, does Oklahoma law provide a remedy for wrongful termination in violation of public policy for employees who can only be terminated for "just cause"?

We conclude that this cause of action is not a "minor" dispute under the RLA and, hence, the district court had jurisdiction to decide the case. On the merits, we conclude that Oklahoma would recognize the tort of wrongful termination in violation of public policy even if other remedies are available to the employee and even if he can be terminated only for "just cause." Accordingly, we reverse the district court's grant of the Defendant's motion for judgment notwithstanding the verdict ("JNOV") and we remand to reinstate the jury verdict.

FACTS

The Plaintiff, Scott Davies, was employed as a mechanic by the Defendant, American Airlines ("American"), in Tulsa, Oklahoma. His employment was governed by the terms of a collective bargaining agreement ("CBA") between American and the Transport Workers Union ("TWU"), the exclusive bargaining agent for American's mechanics. Under the CBA, Davies could be discharged only for "just cause."

Davies sought to change the mechanics' representation to the Aircraft Mechanics Fraternal Association ("AMFA"), a rival of the TWU. To this end, he placed an advertisement in a local newspaper announcing a debate between representatives of the two unions. American approached Davies after the publication of the advertisement and reprimanded him for using the words

"American Airlines" in the advertisement without permission from American. According to American, the use of its name in the advertisement erroneously made American appear to be a sponsor of the debate. American's position was that the advertisement was false, in violation of its Employment Rule 21, and harmful to the welfare of the company, in violation of its Employment Rule 24. When Davies refused to acknowledge his alleged wrongdoing and refused to promise that he would not repeat it, American terminated his employment. In arbitration, it was found that Davies had violated American's rules and that, therefore, American had "just cause" to discharge him. However, the arbitrator did not address the issue of whether the discharge violated clearly established public policy and therefore was actionable under *Burk*.

Prior to the disposition of the arbitration, Davies sued American based upon *Burk*, which provides a right of action to employees who are discharged in violation of public policy. Davies argues that even if he did violate American's rules, thereby giving American "just cause" to discharge him, American's actual motivation for the discharge was not to stop his violations of its rules, but rather to stop his unionizing activity. Because public policy supports the right to select union representation, Davies argues, his discharge violated public policy and entitled him to recover under *Burk*. The jury agreed that American was motivated by anti-union animus and returned a verdict in favor of Davies.

American moved for JNOV on three bases. First, American argued, Davies' *Burk* action is a "minor" dispute under the RLA. Because the RLA vests mandatory and exclusive jurisdiction over "minor" disputes in an arbitral board, American argued, the courts are preempted from hearing such disputes. Second, American argued, *Burk* does not provide a cause of action for violation of a public policy which already has a remedy available for enforcement. Third, American argued,

Burk is limited to "at will" employees and does not provide a cause of action for employees like Davies who can only be discharged for "just cause." The district court granted JNOV for American based on its last two arguments. Davies appeals that decision.

I. RLA Preemption [1]

Although the district court's grant of JNOV was not based upon RLA preemption, American continues to urge this argument as a ground for affirmance. RLA preemption is jurisdictional. *See Zimmerman v. Atchison, T. & S.F. Ry.*, 888 F.2d 660, 661 (10th Cir. 1989) (per curiam). Accordingly, we address this argument first.

The RLA provides an arbitral forum for the resolution of "disputes between an employee . . . and a carrier . . . growing out of grievances, or out of the interpretation or application of agreements concerning rates of pay, rules, or working conditions." 45 U.S.C. §§ 153 First (i) & 184.[2] Such disputes have been characterized as

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[1] By "preemption" we refer to forum preemption. As explained below, the RLA vests exclusive and mandatory jurisdiction over certain claims in an arbitral forum and gives the courts only extremely limited powers of review over decisions of the arbitral board. This doctrine is not the same as the doctrine of field preemption, which addresses whether Congress has explicitly or implicitly (by pervasive and comprehensive regulation) precluded states from regulating a particular area of conduct.

[2] The RLA was extended to cover the airlines by 45 U.S.C. §§ 181 to 188. The mediation and arbitration procedures differ somewhat in the air carrier context as opposed to the railroad context. However, we have regularly looked to § 153 railway preemption cases in determining the scope of preemption in the air carrier context under § 184. *See, e.g., Barnett v. United Air Lines*, 738 F.2d 358, 361-62 (10th Cir.), *cert. denied*, 469 U.S. 1087, 105 S.Ct. 594, 83 L.Ed.2d 703 (1984). Accordingly, we do not distinguish between the two contexts for purposes of preemption.

Although § 153 does not contain a comma after the word "grievances," we include the comma because it does appear in § 184, the air carrier statute.

"minor" disputes. *See Andrews v. Louisville & N. R.R.*, 406 U.S. 320, 321-22, 92 S.Ct. 1562, 1563-64, 32 L.Ed. 2d 95 (1972).

In *Andrews*, the Supreme Court held that the arbitral remedy provided under section 153 of the RLA is mandatory and exclusive for "minor" disputes. *Id.* at 322, 325, 92 S.Ct. at 1564, 1565. Thus, if Davies' *Burk* action can be characterized as a "minor" dispute, then the courts generally lack jurisdiction to hear it. *Barnett v. United Air Lines*, 738 F.2d 358, 361 (10th Cir.) *cert. denied*, 69 U.S. 1087, 105 S.Ct. 594, 83 L.Ed.2d 703 (1984).[3]

The distinction between "major" and "minor" disputes was elaborated upon in *Consolidated Rail Corp. v. Railway Labor Executives' Association*, 491 U.S. 299, 109 S.Ct. 2477, 105 L.Ed.2d 250 (1989) (*"Conrail"*). "The distinguishing feature of [a 'minor' dispute] is that the dispute may be conclusively resolved by interpreting the existing [collective bargaining] agreement." *Id.* at 305, 109 S.Ct. at 2481.

A. *The Need for CBA Interpretation*

American argues that Davies' *Burk* suit is a "minor" dispute because it requires interpretation of an existing CBA. Specifically, American argues that its defense to the suit—i.e., that Davies was fired for "just cause"—requires interpretation of the "just cause" provision of the CBA. Thus, American argues, this suit is preempted. *See Andrews*, 406 U.S. at 324, 92 S.Ct. at 1565; *Zimmerman*, 888 F.2d at 662; *Barnett*, 738 F.2d at 361.

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[3] Federal courts can, under some circumstances, review the findings and order of the arbitrator. *See* 46 U.S.C. § 153 First (q) (court can set aside order where the arbitrator fails to comply with requirements of RLA, lacks jurisdiction, or engages in fraud or corruption); *Barnett*, 738 F.2d at 362 (plaintiff can challenge propriety of arbitral decision if union's breach of duty of fair representation "seriously undermined the integrity of the arbitral process"). However, none of these grounds for federal court review in a "minor" dispute are at issue in the case at bar.

However, the Supreme Court rejected such an argument in *Lingle v. Norge Division of Magic Chef, Inc.*, 486 U.S. 399, 108 S.Ct. 1877, 100 L.Ed.2d 410 (1988). *Lingle* involved a defense of preemption under section 301 of the Labor Management Relations Act ("LMRA"), 29 U.S.C. § 185. Under the LMRA, like the RLA, preemption occurs "if the resolution of a state-law claim depends upon the meaning of a collective-bargaining agreement." *Lingle*, 486 U.S. at 405-06, 108 S.Ct. at 1881. *Lingle* involved a plaintiff who alleged she was illegally discharged in retaliation for filing a workers compensation claim. The employer disagreed with that characterization and claimed that the plaintiff was fired for "just cause" under the CBA. *Lingle* held that the plaintiff's retaliatory discharge claim under the state workers compensation laws could be tried without interpreting the CBA. Accordingly, the Court held that the claim was not preempted notwithstanding the fact that "the state-law analysis might well involve attention to the same factual considerations as the contractual determination of whether [the employee] was fired for just cause." *Id.* at 408, 108 S.Ct. at 1883.

In *Marshall v. TRW, Inc., Reda Pump Division*, 900 F.2d 1517 (10th Cir. 1990), we faced a similar situation where the plaintiff asserted he had been terminated for filing a workers compensation claim. The employer responded that the plaintiff was terminated for "just cause" under the CBA. The plaintiff responded that the "just cause" reason was pretextual. Applying *Lingle*, we held that a court could determine whether the plaintiff was terminated in retaliation for a workers compensation filing without interpreting the "just cause" provision of the CBA. *Id.* at 1521. Even if the employee violated the employer's rules, giving the employer "just cause" to discharge him, the question is whether the employer's motivation for the discharge was the rule violation or retaliation for an activity protected by the retaliatory discharge law. Accordingly, we held that the claim was not preempted by the LMRA. *Id.* Hence, interpreta-

tion of the "just cause" provision of a CBA is not necessary to resolve a retaliatory discharge suit.

Davies' *Burk* suit is essentially a retaliatory discharge suit. The gravamen of his action is that American's actual or primary motivation in firing him, irrespective of any "just cause" it may have had under the CBA, was to stop his unionizing activity. Thus, we hold, pursuant to *Lingle* and *Marshall*, that Davies' *Burk* action does not require interpretation of the CBA and is therefore not preempted by the RLA on that ground.[4]

American urges that *Lingle*, which dealt with the LMRA, is inapposite in the RLA context. However, we believe that the test articulated by *Lingle* for determining whether a dispute requires CBA interpretation is just as valid under the RLA as it is under the LMRA. At least four circuits have looked to LMRA cases such as *Lingle* to determine whether a claim involved CBA interpretation for purposes of RLA preemption. *See Deford v. Soo Line R.R.*, 867 F.2d 1080, 1087 (8th Cir.) (distinguishing *Lingle*), *cert. denied*, 492 U.S. 927, 109 S.Ct. 3265, 106 L.Ed.2d 610 (1989); *Beard v. Carrollton R.R.*, 893 F.2d 117, 122 (6th Cir. 1989) (same); *McCall v. Chesapeake & Ohio Ry.*, 844 F.2d 294, 304 (6th Cir.)

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[4] Appellee has cited to us the recent Eighth Circuit case of *Calvert v. Trans World Airlines, Inc.*, 959 F.2d 698 (8th Cir. 1992). However, we find that case inapposite. That case, unlike the one before us, involved a claim for intentional infliction of emotional distress and the Eighth Circuit concluded that claim could not be resolved without interpreting the CBA to determine if it justified or authorized the conduct at issue. If so, the tort claim would fail. Thus, the court concluded that the plaintiff's claims there "arise from the interpretation and application of the [CBA], and the RLA preempts [such claims] as a minor dispute. . . ." *Id.* at 700. The Tenth Circuit has drawn this same distinction, concluding that a claim for intentional infliction of emotional distress was preempted by § 301 of the Labor-Management Relations Act while recognizing that a retaliatory discharge claim would not be so preempted because it rests on a basis independent of the CBA. *Johnson v. Beatrice Foods Co.*, 921 F.2d 1015 (10th Cir. 1990).

(Order on Rehearing) (same), *cert. denied*, 488 U.S. 879, 109 S.Ct. 196, 102 L.Ed.2d 166 (1988); *Leu v. Norfolk & W.Ry.*, 820 F.2d 825, 830 (7th Cir. 1987) (The "reasoning [of a pre-*Lingle* LMRA case] is equally applicable to the determination of whether a claim couched in terms of a state tort law actually arises under an RLA collective bargaining agreement.").

It is true, as the Supreme Court noted in *Andrews*, that RLA preemption is statutory whereas LMRA preemption is contractual. 406 U.S. at 323, 92 S.Ct. at 1564. However, we do not believe that affects the inquiry into whether a claim requires interpretation of a CBA.[5]

B. *"Minor" Disputes not Requiring CBA Interpretation: The "Omitted Case"*

American next argues that a dispute may be "minor" even where a claim does not require CBA interpretation.[6] In *Elgin, Joliet & Eastern Railway v. Burley*, 325 U.S. 711, 65 S.Ct. 1282, 89 L.Ed. 1886 (1945), the Supreme Court defined a "minor" dispute as one that

> relates *either* to the *meaning or proper application of a particular provision* [*of the CBA*] with reference to a specific situation *or* to an *omitted case*. In the latter event the claim is founded upon some incident of the employment relation, or asserted one, independent of those covered by the collective agreement, e.g., claims on account of personal injuries.

Id. at 723, 65 S.Ct. at 1290 (emphasis added). American argues that under *Burley* we must consider an "omitted

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[5] Although the Ninth Circuit held that the statutory, as opposed to contractual, origin of the RLA affects the inquiry into whether a claim requires CBA interpretation. *Grote v. TransWorld Airlines*, 905 F.2d 1307, 1309-10 (9th Cir.), *cert. denied*, —— U.S. ——, 111 S.Ct. 386, 112 L.Ed.2d 397 (1990), we respectfully disagree with the reasoning of that case.

[6] Although American does not appear to urge this argument on appeal, it was urged below. *See* R. Doc. 76 at 5-10. We address this argument because it goes to our jurisdiction to hear this action.

case"—i.e., any claim "founded upon some incident of the employment relation . . . independent of . . . the collective agreement"—a "minor" dispute, preempted by the RLA.[7]

We disagree with American's "omitted case" argument for three reasons. First, *Burley*, to the extent that it can be read as holding that disputes not requiring CBA interpretation can be "minor" for preemption purposes,[8] appears to have been overruled by *Conrail*. The test developed by *Conrail* for whether a dispute is "minor" is limited to whether the dispute requires CBA interpretation. *Conrail*, 491 U.S. at 303, 109 S.Ct. at 2480.

Second, it would not make sense to extend RLA preemption to disputes that do not require CBA interpretation. As noted by Judge Posner of the Seventh Circuit, arbitrators have no particular expertise in cases that do not require CBA interpretation; thus "arbitration would have no advantage over adjudication in [such a] case." *Lancaster v. Norfolk & W. Ry.*, 773 F.2d 807, 816 (7th

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[7] The contention that "minor" disputes include those that do not require CBA interpretation arguably finds support in the RLA's grant of jurisdiction to the arbitral board for "disputes . . . growing out of grievances, *or* out of the interpretation or application of [CBAs]." 45 U.S.C. § 184 (emphasis added). However, we believe that the "grievance" language is redundant. "Grievances" have been defined as "controversies over the meaning of an existing [CBA] in a particular fact situation, generally involving only one employee." *Brotherhood of R.R. Trainmen v. Chicago River & Ind. R.R.*, 353 U.S. 30, 33, 77 S.Ct. 635, 637, 1 L.Ed.2d 622 (1957); *see also Lancaster v. Norfolk & W. Ry.*, 773 F.2d 807, 814 (7th Cir. 1985) ("A 'grievance' is a claim of violation of the [CBA]"), *cert. denied*, 480 U.S. 945, 107 S.Ct. 1602, 94 L.Ed.2d 788 (1987). Thus, we do not believe that the RLA itself contemplates two distinct types of "minor" dispute.

[8] *Burley*, which dealt with the powers of a collective bargaining agent, did not purport to define "minor" disputes for purposes of preemption. *Conrail*, which was decided forty-four years after *Burley*, noted that "[t]his Court has not articulated an explicit standard for differentiating between major and minor disputes." 491 U.S. at 302, 109 S.Ct. at 2479.

Cir. 1985), *cert. denied*, 480 U.S. 945, 107 S.Ct. 1602, 94 L.Ed.2d 788 (1987).

Third, to hold that every case "founded upon some incident of the employment relation" was a "minor" dispute would undermine the "major"/"minor" distinction. Virtually every dispute between an employer and its employees, including many disputes that are clearly "major," can be said to be "founded upon some incident of the employment relation." For example, it is clear that a dispute arising out of an attempt to secure or change a CBA is a "major" dispute. *Conrail*, 491 U.S. at 302, 109 S.Ct. at 2479; *Burley*, 325 U.S. at 723, 65 S.Ct. at 1289. However, such a dispute could also be characterized as "founded upon some incident of the employment relation." Thus, if such cases were considered "minor," the "major"/"minor" distinction would collapse.

For these reasons, we hold that "minor" disputes, for purposes of RLA preemption, are limited to those that require CBA interpretation.[9] Because Davies' *Burk* action does not require CBA interpretation, it is not a "minor" dispute, and accordingly it is not preempted from judicial resolution.

At least three other circuits have held that a dispute over an employer's disciplinary action that is alleged to result from the employer's wish to interfere with union activity would, if proven, not be "minor." *See Independent Union of Flight Attendants v. Pan American World Airways, Inc.*, 789 F.2d 139, 142 (2d Cir. 1986) (per curiam) ("federal judicial intervention [would be] warranted . . . where it is clear that the employer's conduct has 'been motivated by anti-union animus or . . . an attempt to interfere with its employees' choice of their col-

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[9] We are aware of only one district court that has explicitly held that a dispute can be preempted as an "incident of the employment relation" where it does not involve CBA interpretation. *See Majors v. U.S. Air, Inc.*, 525 F.Supp. 853, 857 (D. Md. 1981). We respectfully disagree with *Majors*.

lective bargaining representative.' ") (citation omitted); *Tello v. Soo Line R.R.*, 772 F.2d 458, 462 (8th Cir. 1985) (same); *Brotherhood of R.R. Trainmen v. Central of Ga. Ry.*, 305 F.2d 605, 609 (5th Cir. 1962) (same).

In summary, we hold that Davies' action is not "minor" and therefore does not fall within the exclusive jurisdiction of the arbitration board. Thus we have jurisdiction to hear Davies' action.

II. The Availability of *Burk*

The district court granted JNOV on two grounds which American continues to urge on appeal. First, the district court held that Oklahoma would not provide a *Burk* remedy where alternative remedies are available. Alternatively, the district court held that Oklahoma would not provide a *Burk* remedy for employees who could be discharged only for "just cause." We reject both of these conclusions.

A. *The Availability of Alternative Remedies*

The district court held that Oklahoma law does not provide a remedy for discharge in violation of public policy under *Burk* where the discharged employee has another remedy available. Because Davies has a remedy available under the RLA, the district court held that he cannot maintain a suit under *Burk*.

Recently, the Oklahoma Supreme Court laid to rest this question, which had divided federal courts in Oklahoma. In *Tate v. Browning-Ferris*, 833 P.2d 1218 (1992), the Court clearly held that a *Burk* action is available notwithstanding the availability of other remedies. *Id.* at 1223.[10] We therefore hold under *Tate* that Davies can

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[10] *Tate* acknowledged that a remedy under *Burk* might be precluded by other remedial legislation where the other remedies are intended to be exclusive. *Id.* at 1220, 1223. This is essentially the doctrine of field preemption. Because neither of the parties

maintain a *Burk* suit notwithstanding the availability of other remedies.

B. *Burk and "For Cause" Employees*

Burk granted a tort remedy as a "public policy exception to the at-will termination rule." 770 P.2d at 28. The district court held that an employee who can be fired only for "just cause" is not terminable "at will," and therefore cannot avail himself of *Burk's* remedy. Because Davies could be terminated only for "just cause," the district court held, he could not sue under *Burk*.

The argument to limit *Burk* to "at will" employees is essentially a variant of the argument, addressed above, that *Burk* is unavailable where a discharged employee has an alternate remedy. Because Davies has a contractual remedy under the "just cause" provision of the CBA, American argues, Oklahoma would not grant him another remedy in the form of a *Burk* suit. Rather, American argues, Oklahoma intended *Burk* as a remedy only for those who would otherwise have no protection against discharge. This argument is belied by *Tate*, in which the Oklahoma Supreme Court sanctioned a *Burk* remedy for an employee who had federal and state statutory remedies. 883 P.2d at 1223.

Burk's concern was not with providing a remedy for employees who otherwise would have none. Had this been *Burk's* concern, the Court presumably would have granted a remedy to any "at will" employee who was terminated in bad faith. However, the court refused to imply such a restriction on discharge. *See* 770 P.2d at 27 (refusing to read implied covenant of good faith into "at will" contract). Rather, *Burk* was concerned that the contractual relation between an employer and employee might not

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raised a field preemption argument, and because such an argument does not affect our jurisdiction over the subject matter of this case, we do not address this exception to *Tate*.

adequately protect " 'society's interest in seeing its public policies carried out.' " 770 P.2d at 28 (quoting *Palmateer v. International Harvester Co.*, 85 Ill. 2d 124, 52 Ill. Dec. 13, 15, 421 N.E.2d 876, 878 (1981)). This is why the Court limited the remedy to employees discharged in violation of "an established and well-defined public policy." *See* 770 P.2d at 29.

When an employer discharges an employee in violation of such a public policy, society is equally aggrieved whether the employee is "at will" or can be discharged only for "just cause." As explained by *Palmateer*, "parties to a contract may not incorporate in it rights and obligations which are clearly injurious to the public." 52 Ill. Dec. at 15, 421 N.E.2d at 878. Thus, whether the contract purported to provide grounds for the discharge or not, the contract could not provide a ground for discharge which is contrary to clear public policy and it is those discharges that trigger a *Burk* cause of action. Accordingly, we believe that Oklahoma would permit a *Burk* action by an employee who could be fired only for "just cause" under his employment contract.[11]

Our holding is supported by *Vannerson v. Board of Regents of the University of Oklahoma*, 784 P.2d 1053 (Okla. 1989). In *Vannerson*, the Oklahoma Supreme Court applied *Burk* without inquiry into whether the plaintiff was an "at will" employee. The plaintiff in *Vanerson* appears to have had the benefit of a formal grievance procedure which limited the defendant's ability to terminate him. *Id.* at 1054. This is essentially the same type of limitation as that in the contract between

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[11] Admittedly, the Oklahoma Supreme Court has characterized *Burk* as an exception to the employment "at will" rule. *See, e.g., Tate*, 833 P.2d at 1223; *Burk*, 770 P.2d at 28. However, at other places in those opinions, the Oklahoma Supreme Court states the *Burk* rule more broadly. *See, e.g., Tate*, 833 P.2d at 1223; *Burk*, 770 P.2d at 29. Thus, we cannot say that the "at will" language in the opinions of the Oklahoma Supreme Court is dispositive.

Davies and American.[12] Notwithstanding this limitation on termination, *Vannerson* permitted the plaintiff's *Burk* suit. *See id.* at 1056 (remanding for retrial of one *Burk* claim where general verdict was based upon two *Burk* claims, one of which did not state adequate public policy ground).

In summary, given *Tate*'s rejection of the proposition that *Burk* is intended to provide a remedy only for employees who otherwise would have none, the fact that *Burk*'s reasoning applies with equal force to "at will" and "for cause" employees, and *Vannerson*'s application of *Burk* in a situation similar to that at bar, we believe that Oklahoma would not limit *Burk* to "at will" employees. Thus, we hold that the district court erred in concluding that Oklahoma would so limit *Burk*.

Because we hold that both of the grounds supporting the district court's grant of American's motion for JNOV are erroneous, we REVERSE that judgment and REMAND for reinstatement of the jury verdict.

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[12] The contract between Davies and American set out both a standard for discharge, "just cause," and a procedure for ensuring that the standard was satisfied in the event of a discharge. In *Vannerson*, we know only that there was a grievance procedure available in the event of a discharge. Although we do not know what standard the employer in *Vannerson* had to satisfy, the existence of a grievance procedure suggests the existence of some standard that precluded the employer from firing the plaintiff arbitrarily.

We use the phrase "at will" to designate an employment relation with no contractual restrictions on the grounds for termination—i.e., a relation in which the employer can arbitrarily fire the employee. Davies would define "at will" more narrowly. According to Davies, an employment relation is "at will" whenever there is no contractual term specifying a temporal duration of employment (e.g., one year). Under Davies' definition, he might be "at will" notwithstanding the "just cause" limitation in his contract. Because we conclude that the Oklahoma Supreme Court would apply *Burk* to relationships that are "at will" in the sense that we use it, we do not address Davies' suggested definition of "at will."

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

Case No. 89-C-881-P

SCOTT DAVIES,

Plaintiff,

vs.

AMERICAN AIRLINES, INC., a Delaware corporation,

Defendant.

JUDGMENT NOTWITHSTANDING THE VERDICT

Upon Motion of the Defendant, American Airlines, Inc., for Judgment Notwithstanding the Verdict, pursuant to Rule 50(b), Federal Rules of Civil Procedure, this Court hereby grants the Defendant's Motion. IT IS HEREBY ORDERED that judgment be entered for the Defendant, American Airlines, Inc.

IT IS SO ORDERED.

DATED this 28 day of September, 1990.

/s/ Layn R. Phillips
LAYN R. PHILLIPS,
United States District Judge

APPROVED AS TO FORM:

/s/ Joe White
JOE WHITE
Attorney for Plaintiff,
Scott Davies

/s/ Reuben Davis
REUBEN DAVIS
KIMBERLY A. LAMBERT
Attorney for Defendant,
American Airlines, Inc.

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

No. CIV-89-C-881-P

SCOTT DAVIES,

Plaintiff,

vs.

AMERICAN AIRLINES, INC.,

Defendant.

ORDER GRANTING DEFENDANT'S MOTION FOR JUDGMENT NOTWITHSTANDING THE VERDICT

[Filed Sep. 28, 1990]

At issue is American Airlines, Inc.'s ("American") motion for judgment notwithstanding the verdict. For the reasons set forth below, the Court GRANTS defendant's motion.

The Court may grant a judgment notwithstanding the verdict when "the evidence points but one way and is susceptible to no reasonable inferences supporting the party for whom the jury found." *Royal College Shop, Inc., vs. Northern Ins. Co. of N.Y.*, 895 F.2d 670, 677 (10th Cir. 1990). The evidence and inferences must be construed most favorably to the nonmoving party. *Id.* The Supreme Court has essentially equated this standard with the "genuine issue" requirement in the summary judgment context, including the principle that the Court's inquiry must be guided by the subsidiary evidentiary standards that apply to the case. *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 251-52, 254-55 (1986).

In this action plaintiff alleged he was wrongfully discharged by defendant because of his union organizing activities. Initially he asserted two claims, one under the Railway Labor Act ("RLA"), 45 U.S.C. § 151 *et seq.*, and one under *Burk v. K-Mart Corp.*, 770 P.2d 24 (Okla. 1989) (recognizing a new tort cause of action for wrongful discharge in violation of public policy). On April 2, 1990, the judge to whom this case was originally assigned denied American's motion to dismiss and alternative motion for summary judgment. In that Order the Court, indulging all reasonable inferences in favor of plaintiff, concluded plaintiff had successfully stated a claim for violation of plaintiff's substantial rights and also for violation of public policy (citing *Burk*), and further concluded that plaintiff's allegations, if proven, would constitute more than a "minor dispute" under the RLA. At the time this motion was ruled upon by the Court, it was known that plaintiff was a union employee operating under the collective bargaining agreement in question. The case was then transferred to the undersigned on April 20, 1990.

On the eve of trial plaintiff amended his complaint to withdraw his RLA claim, and proceeded to trial solely on the *Burk*-type tort claim. The trial was held September 24 and 25, 1990, with the jury returning a verdict in favor of plaintiff. Presently pending are (1) defendant's motion to dismiss the amended complaint, which the Court took under advisement, (2) defendant's motion for directed verdict at the close of all the evidence, which the Court also took under advisement, and (3) defendant's motion for judgment notwithstanding the verdict.

The Court is now convinced it must grant defendant's motion for judgment notwithstanding the verdict for two reasons.

First, the evidence was undisputed that plaintiff was an employee of defendant American, classified as an Aircraft Mechanic, a classification within the skilled labor

craft at American. It was further undisputed that plaintiff was a member of the Transport Workers' Union of America, AFL-CIO, and his employment was governed by the terms of a collective bargaining agreement.

Under the collective bargaining agreement employees could only be discharged when reasons for the discharge were provided in writing (Article 30) and upon just cause (Article 28), with an elaborate grievance procedure available for any employee who believed he or she was treated unjustly (Article 31). Under such circumstances the Court finds plaintiff was not an "at-will employee." An at-will employee is one whose employment is of indefinite duration and who may be discharged "for good cause, for no cause or even for cause morally wrong." *Burk*, 770 P.2d at 25. Since plaintiff could only be discharged for "just cause," he was not an at-will employee. Since he was not an at-will employee, he does not fall within the provisions of *Burk*. *Burk* created a new tort cause of action for the discharge of an at-will employee in violation of public policy. Specifically, *Burk* "adopt[ed] . . . the public policy *exception to the at-will termination rule*" and created a new tort cause of action for the "termination of an *at-will employee* in contravention of a clear mandate of public policy." *Id.* at 28 (emphasis added). Since plaintiff was not an at-will employee, he is not entitled to bring a *Burk*-type tort cause of action.

Second, the Court concludes that even if plaintiff did fall within the provisions of *Burk*, his public policy-based tort cause of action would be preempted by the existence of a remedy under the Railway Labor Act, 45 U.S.C. § 151 *et. seq.* The Court is aware of a split of authority on this issue among the federal judges sitting in Oklahoma. *Compare Paynter v. American Legion Children's Home Corp.*, Nos. CIV-88-166-W and CIV-88-2053-W (W.D. Okla. Oct. 11, 1989) and *Webster v. Avis Rent-A-Car Systems, Inc.*, No. 87-C-718-B (N.D. Okla. May 4,

1989) (holding no preemption exists) *with Zimmer v. Rockwell Int'l Corp.*, No. 89-C-476-C (N.D. Okla. Apr. 2, 1990); *Vogle v. Dillard Department Stores, Inc.*, CIV-89-1262-R (W.D. Okla. June 1, 1990); *Weiss v. Diversey Wyandotte Corp.*, No. CIV-89-1991-A (W.D. Okla. Dec. 21, 1989); *Wilson v. O.I. Brockway Glass, Inc.*, No. 89-91-C (E.D. Okla. Nov. 9, 1989); and *Patterson v. Hudson Farms, Inc.*, No. 88-C-273-E (N.D. Okla. Mar. 1, 1989) (holding preemption exists). This issue has also been certified to the Oklahoma Supreme Court for determination. *Tate v. Browning Ferris, Inc.*, No. CIV-89-806-T (W.D. Okla. Jan. 24, 1990).

The decisions cited above contain a thorough analysis of the preemption issue and this Court finds it unnecessary to repeat the discussion here. The Court, however, joins in those decisions in now finding that any public policy-based tort cause of action which plaintiff may have been entitled to raise under *Burk* is preempted by the existence of a remedy under the RLA.

Accordingly, defendant American's motion for judgment notwithstanding the verdict is GRANTED, and JUDGMENT is hereby entered in favor of defendant American Airlines, Inc. for the reasons set forth in this Order and for the reasons announced on the record on September 28, 1990, which reasons are incorporated by reference.

IT IS SO ORDERED this 28th day of September, 1990.

/s/ Layn R. Phillips
LAYN R. PHILLIPS
United States District Judge

APPENDIX C

TULSA AREA BOARD OF ADJUSTMENT

Case No. M-427-89 TULE

AMERICAN AIRLINES, INC.

and

TRANSPORT WORKERS UNION, LOCAL 514

SCOTT DAVIES: TERMINATION

WILLIAM EATON
Neutral Referee

KENNETH WILLIS
Company Member

JIM COOK
Union Member

APPEARANCES:

For the Union

MARION FINLEY
Vice President
Transport Workers Union, Local 514
Air Transport Division, AFL-CIO
11929 East Pine Street
Tulsa, Oklahoma 74116

For the Company

MICHAEL F. COSTELLO
Manager, Employee Relations
American Airlines, Inc.
Maintenance & Engineering Center
Tulsa, Oklahoma 74151

ISSUE AND EVIDENCE

The question before the Board of Adjustment is whether Grievant Scott Davies was discharged for just cause under the Agreement between the parties, and if not what the remedy shall be. Hearing was held in Tulsa Oklahoma on January 16 1990. At that time the Grievant was fully and fairly represented by the Union, was present throughout the hearing, and testified in his own behalf. Following presentation of evidence by both parties, the matter was submitted to the Board of Adjustment for final and binding determination upon oral argument at the close of the hearing, and was decided by the Board meeting in Executive Session directly thereafter, pending preparation of the Referee's Opinion.

The Grievant, an Aircraft Maintenance Mechanic assigned to the Tulsa Maintenance and Engineering Base, is a member of the Organizing Committee of the Airline Mechanics Fraternal Association (AMFA), which during the period in question was seeking to obtain a representation election for Mechanics and other crafts now represented by TWU at the Tulsa base. In this capacity he placed an ad in the *Tulsa World* newspaper which ultimately led to the Company's issuing him a Career Decision Day Advisory, followed by a Final Advisory. The Career Decision Day Advisory, the accompanying Letter of Commitment, the ad in question, and the Final Advisory reads as follows.

October 19, 1989

TO:	Scott Davies	88900	Mechanic
	Name	Emp #	Classification

RE: "Career Decision Day" Advisory

On Friday, October 13, 1989, the attached advertisement was published in the Tulsa World newspaper. An investigation of this incident revealed that you placed this notice on October 9, 1989. Moreover, you admitted that you were solely responsible for the format of this notice, and that you did not request permission from anyone at AMR Corporation to use the name "American Airlines" as the heading for this notice.

Your actions as stated above fall far short of those which can reasonably be expected of an American Airlines employee, and are also in violation of American Airlines Rules and Regulations #21 and #24, which state:

Rule #21—"Do not make false or slanderous statements about the Company, its employees or patrons."

Rule #24—"Consider the welfare of the Company and your fellow employees. Perform no act which is detrimental to either."

In view of the extremely serious nature of the above infraction, you will be given a "Career Decision Day Off", with pay, to review and select one of the following options:

Option 1: Sign a "Letter of Commitment" agreeing to comply with all Company Rules and Regulations, inclusive of both satisfactory work performance and personal conduct.

Option 2: Sign an agreement *not* to exercise your grievance rights and in turn, the Company

will accept your resignation with the following transition benefits:

(A) Health Insurance benefits will remain in effect for 90 days after date of resignation with premium paid by the Company.

(B) One-way return home pass will be available for you and eligible family members.

(C) Outplacement counseling by appropriate Personnel Office.

(D) Payment of $500. by the Company of documented employment agency fee for other employment.

Option 3: Termination of employment with the option to grieve.

I urge you to carefully consider each option and be prepared to advise me of your selection upon your return back from your "Career Decision Day Off". Additionally, if you choose Option 1, you must sign and date the attached "Letter of Commitment".

/s/ [Illegible]
Supervisor
200/7885
Station/Branch

cc: Personnel File
Employee Relations

✓ Personally handed to employee

— Mailed to employee

10-19-89
Date

/s/ [Illegible]
By:

advisory/28

October 20, 1989

TO:	Scott Davies	88900	Mechanic
	Name	Emp #	Classification

RE: Final Advisory

On October 20, 1989, you returned from a "Career Decision Day" granted to you under the procedures of the Peak Performance Through Commitment Program.

You have failed to select any option indicated on your "Career Decision Day" Advisory, and by default have therefore selected Option #3.

You are hereby terminated from employment with American Airlines effective October 20, 1989.

All Company property, including (but not limited to) AA identification cards/badges of any kind and keys assigned to you are to be returned to me and are not to be used for any purpose after the date of this letter. Any pay due you will be paid upon surrender of all Company property. Please contact me about any questions or other matters regarding benefits, credit union, etc., which you may have.

/s/ [Illegible]
Supervisor

✓ Personally handed to employee

— Mailed to employee

10-20-83 /s/ [Illegible]
Date By:

cc: Personnel File
Employee Relations

advisory/33

LETTER OF COMMITMENT

In consideration for my continued employment with American Airlines, I agree that I will immediately correct my performance problem by complying with all Company Rules and Regulations, as well as maintaining a satisfactory work performance record in all respects. Moreover, I understand that if I do not correct my performance problem, I will be discharged without further warning.

I agree that this Letter of Commitment shall be final and binding and that my decision is irrevocable and shall not be the basis of any grievance or claim of any kind against the Company.

I HAVE CAREFULLY READ AND UNDERSTAND ALL OF THE ABOVE.

Employee's Signature Date

TULSA WORLD ADVERTISEMENT

AMERICAN AIRLINES

Attention All Skilled Labor: Mechanics, Machinists, Fuelers, A/C Cleaners (Exterior & Parts), Blast Operator, Auto Mechanics, Carpenter & Building Maintenance.

A FORMAL DEBATE BETWEEN

—Mr. Ed Wilson, Local 514 of T.W.U.

Mr. O.V. Delle Femine of A.M.F.A.

MEDIATOR:—Oaland Jeffers of Channel 23 KOKL

PLACE:—Mingo Elementary School Gymnasium

TIME: Saturday, October 14th at 12:00 P.M.

Spouses are formally invited to attend

Company Neutrality Policy

Company Labor Relations Representative Dennis Quish testified that the ad as run in the *Tulsa World* violated the Company's policy of strict neutrality in regard to inter-union or intra-union disputes. The ad, in the opinion of the Company, given the bold face AMERICAN AIRLINES heading, implied that the debate referred to between AMFA and TWU was being sponsored by the Company. Thus, to the Company, the ad was false, in violation of Rule 21, in leaving the impression that the Company was involved, when it was not. The welfare of the Company was damaged by this impression, in violation of Rule 24, in the view of the Company.

The Company agreed that there was no evidence that any particular passenger had elected not to fly American Airlines because of the ad, stating that it had made no effort to search out or locate any such person for the reason that it chose not to take any action to publicize such a matter as this.

American Airline Regulation 15-3 B provides that public statements by officers or employees "identified with AA must have advance clearance from the Corporate Communications Department," that all such statements must be in "good taste," and that "negative statements or implications that might reflect unfavorably on our customers, our employees, our competitors, the community we serve, or the government officials with which we deal" must be avoided.

In regard to AMFA efforts to obtain a representation election, the Company posted a bulletin dated July 25 1989 pointing out that American Airlines had "consistently prohibited union politicking, electioneering, etc. on Company premises," and that such a policy "is necessary because the Company wishes to remain neutral regarding any inter/intra union activities." The bulletin pointed out that the "current activity concerning AMFA is no exception" adding, "it is extremely important that everyone in management maintain a neutral position."

The Grievant testified that it was he who placed the *Tulsa World* ad and that he paid for it with a check from the Organizing Committee. The intent, he stated, was to announce the debate, to arouse interest, and to obtain signatures for the yellow representation cards required in order to obtain an election. He insisted, however, that the phrase "AMERICAN AIRLINES" was meant to refer to all airlines in America, not simply to American Airlines, Inc., or to the Tulsa base. He insisted that he had no intent to harm the Company in placing the ad.

A notice advertising the same debate was placed in the *Owasso Reporter* on October 12 1989. That ad was headed "DEBATE," was attributed to the AMFA-TUL Organizing Committee, and in the text of the ad invited all "American Airlines Skilled Labor" to the debate. In the opinion of Labor Relations representative Quish, the Owasso ad was not objectionable for the reason that it was attributed to the AMFA Organizing Committee, and was simply addressed to American Airlines employees in the text of the material, thus creating no impression that it was a Company-sponsored event. A similar ad had been placed in the *Owasso Reporter* in July.

When the Grievant was asked whether the placement of ads in the *Owasso Reporter* did not indicate that the material was aimed specifically at American Airlines employees, not at employees of all airlines in America, his reply was, "It could mean either."

Mechanic Alan Jackson, who identified himself as another member of the AMFA Organizing Committee, testified that no one had advised the Committee that the use of the American Airlines heading was contrary to Company policy, admitting on cross-examination that no permission had been given either. He testified that the Committee had discussed using the AMERICAN AIRLINES heading in order to notify American Airlines people "in our class and craft," and that there had been no intent to harm American Airlines. He reiterated the view of the Grievant that the heading was intended to be addressed to employees of all airlines in America.

29(f) Hearings

Following the appearance of the contested ad, a 29(f) hearing was held by Labor Relations Manager, Mike Costello on October 16 1989, including Company representatives, the Grievant, and a Union representative. At that meeting, according to Labor Relations representative Quish, who attended, Manager Costello explained at some length to the Grievant the way the Company perceives the ad, and its belief that such an ad detracts from the image which the Company wishes to present to the public, and upon which it spends many millions of dollars a year in public relations and publicity. Quish stated that the Grievant was entirely cooperative at this meeting, that he took full responsibility for placing the ad, but that he did refuse to identify others who might have also been responsible, explaining that he refused to identify others for the reason that he did not want "to drag anyone else" into the 29(f) meeting.

The Grievant agreed that the AMERICAN AIRLINES heading had been used "to draw attention" to the ad, and that even if one passenger were induced not to fly American as a result that would be an adverse effect on the Company. He admitted that no permission had been sought to use the heading as placed in the ad, saying that

he knew the Company's Rules and Regulations, including the Company's position on neutrality in inter-union disputes. He said that he had no intent to involve the Company, stating that if he had known the Company would be so upset at the ad he would have done it differently. Nevertheless, he asserted that he had done nothing wrong. Testifying before the Board of Adjustment, the Grievant maintained that he had not been aware of the Company's policy concerning inter-union disputes prior to the 29(f) meeting.

At the close of the 29(f) meeting the Grievant was held out of service with pay for two days pending further Company investigation. In the interim, according to Quish, it was determined that if the Grievant conceded that he had been in error in placing the ad, and if he was willing to correct his behavior in the future, a Second Step Advisory would be the extent of the penalty assessed. The 29(f) hearing was reconvened on October 18, this time conducted by Labor Relations Representative Quish. According to Quish, the demeanor of the Grievant was entirely changed from that of the preceding hearing, he was "not the same individual," and he appeared to have been "coached" in his answers.

It was at this hearing that the Grievant first contended that the AMERICAN AIRLINES heading was not meant to indicate American Airlines, Inc., but all the airlines in America. Asked whether he would agree not to use American Airlines' name again in a smilar manner, the Grievant would only state that he would not use the same "format" again. At the arbitration hearing, when asked whether he had agreed not to the use the American Airlines name in such a manner again, the Grievant replied. "In not so few words." He explained that the reference to American Airlines employees in the Owasso ad had not been objectionable, and that this is what he had in mind in saying that he would not use the same "format" again.

Quish testified that he repeatedly attempted to get the Grievant simply to agree not to use American Airlines in future ads, that the Grievant would again reply with the "format" answer, that he appeared to be "playing word games," and that the meeting was adjourned on that basis. The Grievant was suspended for an additional day with pay so that the Company could consider the matter further.

The 29(f) hearing was convened for a third time on the following day, October 19, again conducted by Manager Costello. Costello explained in great detail what the Company's position was in regard to the apparent attribution of the ad to the Company, and described the Company's Peak Performance Through Commitment (PPC) policy as well. The Grievant continued to insist that he had done nothing wrong, and would say nothing more than that he would not use the same "format" again. In addition, he cited the Railway Labor Act, and for the first time contended that the Company was interfering with AMFA organizing activities.

The Grievant agrees that the PPC program was explained to him, at least in a general way, and that the Career Decision Day options were also outlined including the fact that if he failed to elect one of the three options he would be terminated.

The Company at this point elected not to issue a Second Step Advisory, but to move directly to the Career Decision Day Advisory for the reason that the Grievant would not concede that he had been wrong in placing the ad as he did, and that he would not commit himself to desist from similar action in the future.

Following his Career Decision Day the final session of the 29(f) hearing was convened on October 20 1989. At that time the Grievant refused to elect any of the three options, the meeting was adjourned briefly, the Final

Advisory terminating him was prepared, and it was then presented to him.

The Grievant maintained before the Board of Adjustment that he refused to sign any of the options on the Career Decision Day letter for the reason that that would constitute an admission of guilt, and he was not guilty of any wrongdoing. He also stated his fear that signing an option would sign away his contractual right to grieve, that after that "anyone could say anything," and that he would be discharged with no rights left. He agreed, however, that no one had ever told him that if he signed his Career Decision Day commitment he could be fired without the right to grieve.

Company Policy

The Company's PPC policy, as explained to the Grievant, is a flexible policy designed to resolve employee violations or work deficiencies rather than necessarily to assess discipline upon such occurrences. Some infractions, such as theft, justify termination upon a first offense, despite an employee's prior record.

The first application of the PPC policy is normally by the First Line Supervisor. This may result in nothing more than a discussion, without the involvement of Labor Relations, and often, according to Company testimony, in a resolution of the problem at that level. Even if a more formal meeting is required, and that meeting appears to have achieved the object of correcting the deficiency, the matter may be dropped at that point. As Labor Relations Representative Quish pointed out, terminating an employee is a loss to the Company, particularly as in the case of the Grievant, where the employee is a licensed Mechanic, which is a skill not easy to locate on the job market.

The Company entered into evidence two examples of what it considers would be typical applications of the PPC policy, even though these particular examples oc-

curred either before the PPC policy was formally adopted or at approximately the same time. These incidents concerned the "Atlanta Ten" and the "Dallas Twenty."

In the Atlanta cases arising in 1983, the President and other members of TWU Local 513 had appeared with "sandwich type" signs at Heartsfield International Airport in Atlanta stating that American Airlines had "no licensed, qualified Mechanics making pre-departure inspections." The ten had been discharged as a result, but were reinstated without back pay in a general settlement of the dispute between the Union and the Company. As a part of the settlement, the local 513 President stated: "I have come to realize that our actions were unwarranted and regret the problems they have caused."

The Dallas case involved twenty Fight Attendants passing out handbills at DFW which also questioned the commitment of the Company to safety, and to its fairness in dealing with employees. These employees were also reinstated after lengthy negotiations, and upon certain conditions not relevant to the present dispute.

In presenting these cases, it was the Company's stated intention to indicate its flexibility in handling employee disputes, as incorporated into the Peak Performance Through Commitment Policy, which it contends was applied in the case of the present Grievant.

ARGUMENTS

Company

After hearing the Grievant's testimony, the Board of Adjustment may share the frustration of the Company in its inability to get information on the event. Neither Union witness was cooperative, but appeared to be coached and had chosen their words very carefully in testifying before the Board. This is contrary to the Grievant's open and cooperative attitude at the first 29(f) hearing.

The Grievant offers the ridiculous notion that, in using the AMERICAN AIRLINES heading, he did not mean his company, but meant to address the ad to all airlines in America. It is obvious that he meant to address the ad to American Airlines employees in Tulsa, and to no one else.

He admits that he knew the Company wanted nothing to do with the intra-union dispute between AMFA and TWU. He knew that before he placed the ad, and he placed it anyway. In contrast to the *Owasso Reporter* ad, which simply addressed American Airlines employees in the text, and which was clearly attributed to the AMFA Organizing Committee, the ad in dispute, while giving the appearance of being sponsored by American Airlines, contained no attribution indicating that it had been placed by AMFA.

The Company spends millions of dollars to maintain its number one status in size, quality, and innovation, and to set it apart from other airlines in the industry. In the Tulsa area the ad as placed by the Grievant suggests labor strife, and may well cause some potential patrons to use alternate carriers. The Company did not go out of its way to find out if this was so, because it chooses not to air its "dirty laundry" in that fashion. Prior Boards of Adjustment have recognized that the Company does not have any obligation to seek out members of the public in such circumstances.

There are several layers of potential harm in what the Grievant did. First, passengers may not choose to fly American Airlines. Secondly, members of other unions, particularly TWU members, may believe that the Company is sponsoring the ad, and thereby soliciting a rival union on the property. Finally, employees on the floor, seeing the ad in a newspaper of some 200,000 circulation in the Tulsa area, may be led to believe that the Company is attempting to incite union rivalries.

The Company was unable to locate any prior System Board cases directly on point. The "Atlanta Ten" and the "Dallas Twenty" are the closest approximations, and those cases indicate that, when employees who have violated Company rules recognize that they have done so, and commit themselves to correct their behavior, the Company's policy is flexible, and the Company is willing to recognize when the problem has been resolved.

No admission of guilt, and no resolution, was reached in the present dispute, even though the PPC program was explained to the Grievant, and he was presented with the clear Career Decision Day Advisory, which was carefully explained to him.

Where such actions have been taken against the Company's interest, and contrary to known Company policy, a stringent penalty must apply. To allow Company employees to go out and use the Company name as they see fit would lead to disastrous consequences.

The Grievant having failed to recognize his wrongdoing, or to commit to correct his behavior, discharge is the only alternative open to the Company. For these reasons it is respectfully requested that the Company's action be sustained and the grievance denied in its entirety.

Union

The Atlanta and Dallas cases cited by the Company are different from today's case for the reason that in those cases the employees involved had an intent to damage the Company. The present Grievant had no such intent, and there is no evidence that the Company was damaged in any way.

The Grievant is an employee of some five and one-half years seniority with an excellent record, and is a good worker. He was simply working with a group trying to organize the mechanics of American Airlines, and had no

intent to harm the Company in placing the contested ad in the *Tulsa World*. That was not the first such ad to appear in a local newspaper, and the Company has not objected to other ads of a similar nature.

The Company admits that at the time of contract negotiations both Union representatives and Union members give statements to the media, and that this is a common practice. The case here is unique, and there are no prior System Board decisions pro or con regarding such incident.

The ad in the *Tulsa World* does not say that American Airlines supports AMFA, while the Union witnesses maintain that they were simply addressing the ad to all mechanics in the area, no matter who they worked for.

Elkouri and Elkouri, *How Arbitration Works*, in their 4th Edition (p 657), point out that discipline for conduct away from the plant may not normally be assessed unless that conduct is such as to harm the Company, its reputation, or its product. No such harm has been demonstrated in the present dispute. Moreover, the Employer has the burden of proving just cause in a discharge case, a burden which has not been met in this dispute.

The message here is that once a Career Decision Day letter has been issued, the employee has no choice but to find other employment for the reason that if he signs the letter he can thereafter be fired without any chance in arbitration.

Unlike the case of the "Atlanta Ten" or the "Dallas Twenty" where leaflets or other information alleged Company safety problems, and where the attempt clearly was to harm the Company, there is no such evidence in the present dispute.

For these reasons the Union asks that the Grievant be put back to work with no loss of benefits, and be made whole in all respects.

ANALYSIS

The first consideration is to examine the nature of the ad itself. Two words, the bold faced captioned words "AMERICAN AIRLINES," clearly dominate the message of the ad. The debate announced is between the President of TWU local 514 and a representative of AMFA. Local 514 represents Mechanics and other employees at the American Airlines Maintenance and Engineering base in Tulsa, employees AMFA is attempting to organize. Related ads appeared in the *Owasso Reporter* specifically directed, in their text, to "All American Airlines Skilled Labor." Owasso is a locality adjacent to Tulsa in which a great many of the thousands of employees at American Airlines reside.

The Grievant contends that he meant no harm to the Company in using the AMERICAN AIRLINES heading on his ad. Perhaps not initially. However, after the Company patiently and repeatedly explained to him its view that great harm can result through such unauthorized identification of the Company with intra-union disputes, the Grievant reverted to the explanation that the words AMERICAN AIRLINES did not refer to the present Company, but to all airlines in America. The absurdity of this explanation in the present context is such as to require no further comment.

The Grievant maintained throughout four sessions of the 29(f) meeting, and in his testimony before the Board of Adjustment, that he has done no wrong. Presented with the Career Decision Day letter, he refused to elect any of the options, or to commit himself to desist from unauthorized use of the Company name, as he had refused to do in the 29(f) sessions. While there is a patina of legitimacy of the Grievant's stated concern that signing the Letter of Commitment as written might deprive him of contractual grievance rights, in the entirety of this dispute the Board agrees with the Company's conclusion that the Grievant is "playing word games," and not making a

good faith attempt to meet the Company's objections, or to correct his behavior.

The parties have presented a number of prior arbitration decisions, both from American Airlines Boards of Adjustment and from industry generally, to assist in evaluating this dispute. Some of these cases simply state truisms about which there is no dispute, such as the requirement that the Company bear the burden of proving just cause in discharge cases by a preponderance of the evidence, or that a well reasoned decision by management, taken in good faith, as to what the penalty for an infraction should be ought not, in most circumstances, to be disturbed.

The Union offers Case No. M-577-75 TULE to illustrate a circumstance in which the Company had failed to show that the grievant had been definitely put on notice that the infraction cited (consumption of a meal from a terminated flight) would be considered theft and a ground for discharge. That case might serve the present Grievant's cause had he been initially presented with the Final Advisory without further investigation or clarification of the Company's policy herein. However, even after the Company's policy was carefully and repeatedly explained to him, this Grievant still maintained that he had done nothing wrong, and refused to commit himself to any correction of his behavior.

The Union also cites Case No. M-301-77 PHX by the present Chairman, indicating that where there is no showing of wrongful intent a penalty of discharge may be reversed. But again, in the present dispute it is not the Grievant's original intent, whatever that may have been, which is controlling. Rather, it is his persistent refusal to recognize an infraction, or to correct his behavior, even after his error had been patiently explained to him.

The Company offers Case No. SS-201-75 BOS, in which a Flight Attendant's discharge for selling t-shirts aboard

an aircraft bearing inscriptions damaging to the Company's image was upheld. Similarly, in Case No. M-542-76 TULE, a ten day suspension against a Building Cleaner for having made adverse comments against the Company while traveling as a non-revenue from DFW to TULE was upheld.

Case No. 167-87 ORD dealt with the application of the PPC program. In that case Referee Mark L. Kahn endorsed the Company's option to skip the first two Advisories, and to move directly to a Career Decision Advisory, when circumstances warrant. He pointed out, at the same time, that employees are entitled to grieve the merits of any application of the PPC, "including a discharge subsequent to the signing of a Letter of Commitment." In that case the grievant had elected termination with the option to grieve.

The case offering an opinion which is most relevant to the facts of the present dispute is No. SS-36-66 DAL, in which a Flight Attendant had allegedly offered passengers on an aircraft in flight "dinner or Alka Seltzer," explained that "it was the crew's first trip," and that as a result "they were practicing." Referee Peter M. Kelliher found that the Grievant did not correctly state the facts when asked to do so after being advised of these charges, adding that, "It may well be that the Company would not have instituted discharge proceedings if she had made a full and honest statement." He found that the statements made "did reflect upon the Company's service," and that in the circumstances discharge was warranted. Similar considerations govern the present dispute.

The Company herein considered the actions of the Grievant over a period of an entire week, including four 29(f) sessions with him. He was clearly apprised of the severe consequences which can result from unauthorized use of the Company name, particularly in regard to intra-union disputes, and yet he remained recalcitrant in admitting

error or in committing to desist from such action in the future, and in offering a patently absurd excuse for what he had done.

In such circumstances there is no basis upon which the Board of Adjustment could justify reversal of the Company's decision to discharge.

/s/ William Eaton
WILLIAM EATON
Neutral Referee

January 24, 1990

DECISION

Grievant Scott Davies was discharged for just cause.

/s/ Kenneth Willis
KENNETH WILLIS
Company Member

/s/ Jim Cook Dissent
JIM COOK
Union Member

/s/ William Eaton
WILLIAM EATON
Neutral Referee

January 24, 1990

APPENDIX D

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

No. 90-5231

(Dist. Ct. No. 89-C-881-P)

SCOTT DAVIES,
Plaintiff-Appellant,

v.

AMERICAN AIRLINES, INC., a Delaware corporation,
Defendant-Appellee.

ORDER

Entered September 8, 1992

Before McKAY, LOGAN, SEYMOUR, MOORE, ANDERSON, TACHA, BALDOCK, BRORBY, EBEL and KELLY, Circuit Judges, and ANDERSON *, District Judge.

This matter comes on for consideration of appellee's petition for rehearing and suggestion for rehearing en banc.

Upon consideration whereof, the petition for rehearing is denied by the panel that rendered the decision.

In accordance with Rule 35(b), Federal Rules of Appellate Procedure, the suggestion for rehearing en banc was transmitted to all of the judges of the court who

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* The Honorable Aldon J. Anderson, Senior District Judge of the United States District Court for the District of Utah, sitting by designation.

are in regular active service. No member of the panel and no judge in regular active service on the court having requested that the court be polled on rehearing en banc, Rule 35, Federal Rules of Appellate Procedure, the suggestion for rehearing en banc is denied.

Entered for the Court

ROBERT L. HOECKER
Clerk

By: /s/ Patrick Fisher
PATRICK FISHER
Chief Deputy Clerk

APPENDIX E

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

No. 90-5231
(Dist. Ct. No. 89-C-881-P)

SCOTT DAVIES,
Plaintiff-Appellant,

v.

AMERICAN AIRLINES, INC., a Delaware corporation,
Defendant-Appellee.

ORDER

Filed October 1, 1992

Before ANDERSON and EBEL, Circuit Judges and ANDERSON *, District Judge.

This matter comes on for consideration of appellee's motion for stay of mandate.

Upon consideration whereof, the motion is granted. The mandate is stayed pending final disposition by the Supreme Court of the United States.

Entered for the Court

/s/ Robert L. Hoecker
ROBERT L. HOECKER
Clerk

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* The Honorable Aldon J. Anderson, Senior District Judge of the United States District Court for the District of Utah, sitting by designation.

APPENDIX F

RELEVANT PROVISIONS OF AGREEMENT BETWEEN AMERICAN AIRLINES AND TRANSPORT WORKERS UNION OF AMERICA, AFL-CIO COVERING AIRLINES MECHANIC, PLANT MAINTENANCE AND GROUND SERVICE EMPLOYEES OF AMERICAN AIRLINES, INC., EFFECTIVE MAY 5, 1989

ARTICLE 28—NO DISCRIMINATION, AND RECOGNITION OF RIGHTS AND COMPLIANCE

(a) The Company and the Union agree to make it a matter of record in this Agreement that in accordance with the established policy of the Company and the Union, the provisions of this Agreement will apply equally to all employees hereunder regardless of sex, color, race, creed or national origin.

(b) The Union recognizes that the Company shall have sole jurisdiction of the management and operation of its business, the direction of its working force, the right to maintain discipline and efficiency in its hangars, stations, shops or other places of employment, and the right of the Company to hire, discipline and discharge employees for just cause, subject to the provisions of this Agreement. It is agreed that the rights enumerated above shall not be deemed to exclude other preexisting rights of management not enumerated which do not conflict with other provisions of this Agreement.

(c) Any decisions or agreements relating to the interpretation or application of this Agreement made jointly by the Company and the Union shall be binding on every individual employee claiming or entitled to the benefits of this Agreement.

(d) All letters of discipline (warning or suspension) will be removed after a period of two (2) years from date of issuance.

ARTICLE 31—GRIEVANCE PROCEDURE

(a) An employee who believes that he has been unjustly dealt with or that any provision of this Agreement has not been properly applied or interpreted, or against whom the Company has preferred charges, in writing, may present his grievance in person or through his representatives, within seven (7) calendar days to his immediate supervisor, who shall evaluate the grievance or complaint and render his decision as soon as possible, but not later than seven (7) calendar days following receipt of said grievance.

(b) If the decision of the immediate supervisor is not satisfactory to the employee whose grievance is being considered, it may be appealed within ten (10) calendar days to the Chief Operating Officer, designated by the Company, who shall fully investigate all of the facts upon which said grievance is based and shall render a decision thereon as soon as possible, but not later than ten (10) calendar days following his receipt of the appeal.

(c) If the decision of the designated Chief Operating Officer is not satisfactory to the employee, the grievance and the decision thereon may be appealed to the System General Board of Adjustment, as provided for in Article 32 of this Agreement, provided, however, said appeal must be submitted within twenty (20) calendar days of receipt of the decision rendered by the designated Chief Operating Officer.

(d) All grievances handled under the procedure provided above shall be in writing and shall be signed by the employee whose grievance is being handled, and all decisions on said grievance shall be in writing. In cases in which the aggrieved employee authorizes his representative to handle his grievance for him, the submission of the grievance or appeal shall be accompanied by a statement signed by the employee fully authorizing his

representative to act for him in the disposition of said grievance. Two (2) copies of all grievance answers will be submitted to the Local Union.

(e) An employee who has a grievance may present said grievance to his immediate supervisor during regular work hours and an Accredited Representative of the Union may investigate, discuss and present a grievance of an employee or employees during regular work hours without suffering loss of pay for time so spent.

(f) If any decision made by the Company under the provisions of this Article is not appealed by the employee affected within the time limit prescribed herein for such appeals, the decision of the Company shall become final and binding.

(g) If, as a result of a decision in any of the steps of the grievance procedure as provided herein, an employee is exonerated, he shall, if he has been held out of service, be reinstated without loss of seniority and shall be paid at regular rates for time lost.

(h) When it is mutually agreed that a stenographic report is to be taken of any hearing, in whole or in part, the cost will be borne equally by both parties to the dispute. When it is not mutually agreed that a stenographic report of the proceedings is to be taken, any written record available of such hearing made by either of the parties to the dispute shall be furnished to the other party to the dispute upon request, provided that the cost of such written record so requested shall be borne equally by both parties to the dispute.

(i) Upon the request of an Accredited Union Representative, the Company will inform the Union of its decision on any grievance regarding which a formal hearing or investigation has been held at which the aggrieved employee was not represented by his Accredited Union Representative.

ARTICLE 32—BOARDS OF ADJUSTMENT

I. *Boards of Adjustment*

(a) Pursuant to the provisions of the Railway Labor Act, as amended, there are hereby established (i) a System General Board of Adjustment, (ii) two System Divisional Boards of Adjustment, and (iii) six Area Boards of Adjustment.

(b) The Boards shall have jurisdiction only over disputes between the Company and the Union or any employee or employees governed by this Agreement growing out of grievances involving interpretation or application of this Agreement. The Boards shall have no jurisdiction, whatsoever, over proposals or disputes relating to general changes in hours of work, rates of pay, rules or working conditions. Proposals relating to general changes in hours of work, rates of pay, rules or working conditions shall be handled in the manner provided for in Article 46 of this Agreement.

II. *System General Board of Adjustment*

(a) The System General Board of Adjustment shall be composed of a Company member, a Union member and a neutral referee, the latter to serve for an indefinite term; however, either party may cause the services of the neutral referee to be terminated by giving written notice to the other party and to the neutral referee.

(b) If a neutral vacancy occurs and the Company and the Union cannot agree on a successor within fifteen (15) days, the American Arbitration Association will be requested to select a neutral in the manner described in Rule 12 of its Voluntary Labor Arbitration Rules, as in effect on February 1, 1965.

(c) The Company member and the Union member of the General Board shall serve as Chairman and Vice-Chairman, respectively, and shall exchange offices at the end of each calendar year.

(d) The General Board shall hear and determine all disputes properly before it which are not within the jurisdiction of the Divisional or Area Boards pursuant to paragraphs III. and IV. of this Article.

III. *System Divisional Boards of Adjustment*

(a) Each Divisional Board shall be composed of a Company member, a Union member and a neutral referee.

If the position of neutral referee of a Divisional Board becomes vacant and the Company and the Union cannot agree on a successor within fifteen (15) days, one shall be selected in the same manner as the filling of a vacancy under paragraph II. (b) of this Article.

(b) The jurisdiction of the Divisional Boards shall be as follows:

(1) Divisional Board I shall have jurisdiction over overtime and other rate-of-pay grievance cases.

(2) Divisional Board II shall have jurisdiction over scope, work assignment and seniority grievance cases.

IV. *Area Boards of Adjustment, Discipline and Dismissal Cases*

(a) Area Boards of Adjustment shall be maintained in New York, Chicago, Los Angeles, Tulsa, San Francisco and Dallas/Ft. Worth. The jurisdiction of each such Board shall be limited to discipline and dismissal cases arising in the area in question.

(b) Each Area Board shall be composed of one member appointed by the Company, one member appointed by the Union, and a neutral referee as Chairman. However, by mutual agreement of the parties, an additional neutral referee may be selected to hear Area Board cases scheduled in cities other than those designated in the above paragraph. Members of the Area Boards appointed by the parties shall serve at the pleasure of the party making the

appointment, except that a Board member shall continue to serve until his successor has been appointed. Each neutral referee shall serve for an indefinite term; either party may cause the services of the neutral referee to be terminated (except as to cases already submitted to him) by giving written notice to the other party and to the neutral referee.

(c) If the position of neutral referee of an Area Board becomes vacant and the Company and Union cannot agree on a successor within fifteen (15) days, one shall be selected in the same manner as the filling of a vacancy under paragraph II.(b) of this Article.

(d) Each Area Board shall hold hearings at a location in its city, off Company premises, to be determined by the Area Board, except that another city may be designated by mutual agreement of the Union Local President and the Employee Relations representative designated by the Company.

V. *Procedures Generally Applicable to the Boards*

(a) The System General Board and the two System Divisional Boards shall meet in the city where the general offices of the Company are maintained (unless a different place of meeting is agreed upon by the parties to the dispute).

(b) The Company and Union shall at all times have their respective Board members available at the convenience of the various neutral referees, and alternate members shall be provided by the Company or Union, as the case may be, whenever its regular Board member is not available. If an alternative member is not provided within a reasonable period of time, the neutral referee shall proceed with the hearing and decision of the matters before the Board without participation by the absent member, and the decision of the neutral referee shall constitute the decision of the Board.

(c) The Company or the Union may terminate the services of a neutral referee at any time, except as to cases already submitted to him, by giving written notice to the other party and to the neutral referee.

(d) All disputes referable to the Boards shall be sent to the General Board and, based on the primary issue in dispute, the Chairman and Vice Chairman shall jointly refer the matter to the appropriate Board (General, Divisional or Area Board) for hearing and decision. Any disagreement as to which Board is the appropriate Board shall be determined by the General Board.

(e) As to disputes before the General Board and Divisional Boards, the Chairman and Vice Chairman of the General Board shall set the hearing dates (providing notice thereof to the parties). Each party will designate a representative for each Area Board who jointly shall be responsible for the scheduling of cases referred to the Area Board they represent. Each party will supply to the other, and keep current, a list of its designated representatives for the Area Boards. The designated Company and Union representatives of each Area Board shall set the hearing dates for such Board (providing notice thereof to the parties and to the Administrator—Boards of Adjustment). All cases shall be set for hearing promptly in order to keep the number of cases docketed to a minimum. Unless the parties agree otherwise, the case with the lowest docket number pending before a Board will be scheduled first; other cases pending before that Board arising from the same station as the case with the lowest docket number will be scheduled for hearing on that meeting of the Board. In the event there are no such other cases, the case with the next lowest docket number will be scheduled, and the aforementioned scheduling procedure will be followed until there are a sufficient number of cases scheduled to insure full days of hearing. Cases so scheduled but not heard for lack of time will be rescheduled in accordance with the above scheduling procedure.

The parties recognize that as the scheduling of cases takes place well in advance of dates of hearing, those cases rescheduled due to lack of hearing time will be out of numerical sequence with those already scheduled.

If the designated Company representative and the designated Union representative for any Board jointly consider a case of sufficient urgency and importance to warrant an expedited hearing, a hearing shall be scheduled within fifteen (15) days of their request.

(f) A submission to a Board shall be in the form of a petition stating:

(1) the name of the employee involved;

(2) a statement that the remedies provided by Articles 29, 30 or Article 31, as the case may be, have been exhausted;

(3) a statement of the nature of the dispute (including question or questions at issue) and the basis for the jurisdiction of the Board;

(4) the position or contention of the party filing the petition.

(g) A petition shall be served upon the other party, who shall have the right, within fifteen (15) days after receipt to file a written answer.

(h) Five (5) copies of each petition and answer shall be delivered to the office of the General Board, which shall file the original and transmit one (1) copy thereof to each member of the appropriate Board.

(i) Employees and the Company may be represented at Board hearings by such person or persons as they may choose and designate. Evidence may be presented either orally or in writing or both.

(j) Upon the request of either party to the dispute, or of two (2) Board members, a Board shall summon wit-

nesses to testify at Board hearings. The number of witnesses who are employed by the Company shall not be greater than the number which can be spared without interference with the service of the Company.

(k) Except as provided by paragraph V.(b) of this Article, a majority vote of all members of a Board shall be competent to make a finding or a decision with respect to any dispute properly before it, and such finding or decision shall be final and binding upon the parties to such dispute.

(l) The failure of a Board to decide a dispute under the procedure established herein shall not serve to foreclose any subsequent rights or procedures which the Railway Labor Act, as amended, may provide with respect to the settlement of such disputes, and nothing herein shall be construed to limit, restrict or abridge the rights or privileges accorded to either the employees or to the employer, or to their duly Accredited Representatives, by said Act.

(m) Board findings and decisions shall be stated in writing and shall be rendered within thirty (30) days from the close of hearing, unless such period is extended by agreement of the parties to the dispute. In each case a copy of the finding or decision shall be furnished the Company, the Union and such employee or employees as are parties to the dispute. If a dispute arises as to the interpretation of the finding or decision, then, upon request of the Company, the Union or such employee or employees as are parties to the dispute, the Board shall interpret the finding or decision.

(n) The System General Board and each Area Board shall keep complete and accurate records of all matters submitted to it and of all findings and decisions made. A stenographic record at all Boards will be taken if requested by either party to the dispute. In such case, the cost of such record shall be borne by the requesting party. The other party, upon request, will be furnished a copy of the

record, in which case the cost of such record shall be borne equally by both parties to the dispute.

(o) Each party will assume the compensation, travel expenses and other expenses of the Board members selected by it and of the witnesses called or summoned by it.

(p) So far as space is available, witnesses who are employees of the Company shall receive free transportation over the lines of the Company from the point of duty or assignment to the point at which they must appear as witnesses and return, to the extent permitted by law.

(q) Each Board, upon agreement of a majority of its members, shall have the authority to incur expenses necessary for the proper conduct of the business of the Board. Such expenses, as well as the expense of each neutral referee, shall be shared equally by the parties hereto. Union Board members who are employees of the Company shall be granted necessary leaves of absence for the performance of their duties as Board members. So far as space is available, the Board members shall be furnished free transportation over the lines of the Company for the purpose of attending Board meetings to the extent permitted by law.

(r) Every Board member shall be free to discharge his duty in an independent manner, without fear that his individual relations with the Company or with the employees hereunder may be affected in any manner by any action taken by him in good faith in his capacity as a Board member. Each party shall specifically instruct each Board member selected that he shall at all times, while serving in that capacity, act not as a partisan or advocate of a partisan group or cause but shall act and serve solely to render impartial findings and just decisions.

APPENDIX B

CLASSIFICATION DESCRIPTION
TITLE I—AIRLINE MECHANIC
MECHANIC

SUMMARY

The work of the Mechanic classification, depending upon assignment, in addition to the work specified for the Junior Mechanic classification, includes any or all of the following: Performing skilled work in those operations such as trouble shooting, individually or with Crew Chief, management or professional direction, disassembly, checking and cleaning, repairing, replacing, testing, adjusting, assembling, installing, servicing, fabricating, taxiing or towing airplanes and/or run-up engines, deicing aircraft, required to maintain the airworthiness of aircraft and all their components while in service or while undergoing overhaul and/or modification. Certifies for quality of own workmanship, including signing mechanical flight releases, except signs mechanical flight release for all work done on field work. In those work positions where stock chasers are not maintained and/or available at the time may chase own parts. May have other Mechanic personnel assigned to assist him in completing an assignment. Works according to FAA and Company regulations and procedures and instructions from Crew Chief or supervisor. Completes forms connected with work assignments according to established procedures and will communicate with other Company personnel as required in a manner designated by the Company.

In addition to the above duties, performs the following duties as assigned: cleaning of aircraft windshields; connecting/removing ground power and ground start units; pushing out/towing of aircraft and related guideman functions.

APPENDIX G

RELEVANT PROVISIONS OF AMERICAN AIRLINES EMPLOYEE HANDBOOK

Section 3. Employee Policies

Peak Performance Through Commitment

Peak Performance Through Commitment (PPC), a process designed to correct problems rather than punish an individual for poor performance, demonstrates American's commitment to create a workplace where each employee is treated with dignity and respect. It is an action-oriented system intended to recognize, reinforce and reward an employee's best efforts. PPC encourages employees and their supervisors to work together as a team. However, employees remain responsible for their work performance and maintaining high standards.

PPC is a process of exchanging ideas and sharing information—keeping the lines of communication open. The dialogue between employees and supervisors may be corrective or motivational. This positive system recognizes and rewards employees with high performance and coaches and counsels employees with poor performance. When employees with poor performance or inappropriate personal conduct do not improve after coaching and counseling, the supervisor may initiate a series of advisory sessions:

- A first advisory session—when the employee fails to respond to coaching and counseling.
- A second advisory session—when the employee fails to respond to additional coaching and counseling.

- A "Career Decision Day"—a day off with pay when the employee is given a final opportunity to commit to change. A letter of commitment is given to the employee for review at this time.
- A final advisory session—when the employee fails to live up to the letter of commitment.

PPC is a proactive system intended to recognize, reinforce, reward and improve all job performances. Its success depends on our collective efforts.

Performance Appraisals

Appraisals are valuable opportunities for employees to gain insight into how job performance is viewed by the supervisors, how it can be improved and how it can be used to prepare for future responsibilities.

Performance evaluation and feedback systems exist in various formats depending on the work group. In all cases the purpose is to provide meaningful information to allow employees to correct performance deficiencies. The systems also encourage supervisors to reinforce excellent job performance.

For additional information see AA REGS 130-1, 130-4, and 130-5.

September, 1990

APPENDIX H

RELEVANT STATUTORY PROVISIONS

Section 301 of the Labor-Management Relations Act, 29 U.S.C. § 185

§ 185. Suits by and against labor organizations

(a) Venue, amount, and citizenship

Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this chapter, or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties.

(b) Responsibility for acts of agent; entity for purposes of suit; enforcement of money judgments

Any labor organization which represents employees in an industry affecting commerce as defined in this chapter and any employer whose activities affect commerce as defined in this chapter shall be bound by the acts of its agents. Any such labor organization may sue or be sued as an entity and in behalf of the employees whom it represents in the courts of the United States. Any money judgment against a labor organization in a district court of the United States shall be enforceable only against the organization as an entity and against its assets, and shall not be enforceable against any individual member or his assets.

(c) Jurisdiction

For the purposes of actions and proceedings by or against labor organizations in the district courts of the United States, district courts shall be deemed to have

jurisdiction of a labor organization (1) in the district in which such organization maintains its principal office, or (2) in any district in which its duly authorized officers or agents are engaged in representing or acting for employee members.

(d) Service of process

The service of summons, subpena, or other legal process of any court of the United States upon an officer or agent of a labor organization, in his capacity as such, shall constitute service upon the labor organization.

(e) Determination of question of agency

For the purposes of this section, in determining whether any person is acting as an "agent" of another person so as to make such other person responsible for his acts, the question of whether the specific acts performed were actually authorized or subsequently ratified shall not be controlling.

RAILWAY LABOR ACT

Section 2, 45 U.S.C. § 151a

§ 151a. General purposes

The purposes of the chapter are: (1) To avoid any interruption to commerce or to the operation of any carrier engaged therein; (2) to forbid any limitation upon freedom of association among employees or any denial, as a condition of employment or otherwise, of the right of employees to join a labor organization; (3) to provide for the complete independence of carriers and of employees in the matter of self-organization to carry out the purposes of this chapter; (4) to provide for the prompt and orderly settlement of all disputes concerning rates of pay, rules, or working conditions; (5) to provide for the prompt and orderly settlement of all disputes

growing out of grievances or out of the interpretation or application of agreements covering rates of pay, rules, or working conditions.

Section 2, 45 U.S.C. § 152

§ 152. General duties

* * * *

Third. Designation of representatives

Representatives, for the purposes of this chapter, shall be designated by the respective parties without interference, influence, or coercion by either party over the designation of representatives by the other; and neither party shall in any way interfere with, influence, or coerce the other in its choice of representatives. Representatives of employees for the purposes of this chapter need not be persons in the employ of the carrier, and no carrier shall, by interference, influence, or coercion seek in any manner to prevent the designation by its employes as their representatives of those who or which are not employees of the carrier.

Fourth. Organization and collective bargaining; freedom from interference by carrier; assistance in organizing or maintaining organization by carrier forbidden; deduction of dues from wages forbidden

Employees shall have the right to organize and bargain collectively through representatives of their own choosing. The majority of any craft or class of employees shall have the right to determine who shall be the representative of the craft or class for the purposes of this chapter. No carrier, its officers, or agents shall deny or in any way question the right of its employees to join, organize, or assist in organizing the labor organization of their choice, and it shall be unlawful for any carrier to interfere in any way with the organization of its employees, or to use the funds of the carrier in maintaining or assisting or contributing to any labor organization,

labor representative, or other agency of collective bargaining, or in performing any work therefor, or to influence or coerce employees in an effort to induce them to join or remain or not to join or remain members of any labor organization, or to deduct from the wages of employees any dues, fees, assessments, or other contributions payable to labor organzations, or to collect or to assist in the collection of any such dues, fees, assessments, or other contributions: *Provided*, That nothing in this chapter shall be construed to prohibit a carrier from permitting an employee, individually, or local representatives of employees from conferring with management during working hours without loss of time, or to prohibit a carrier from furnishing free transportation to its employees while engaged in the business of a labor organization.

* * * *

Ninth. Disputes as to identity of representatives; designation by Mediation Board; secret elections

If any dispute shall arise among a carrier's employees as to who are the representatives of such employees designated and authorized in accordance with the requirements of this chapter, it shall be the duty of the Mediation Board, upon request of either party to the dispute, to investigate such dispute and to certify to both parties, in writing, within thirty days after the receipt of the invocation of its services, the name or names of the individuals or organizations that have been designated and authorized to represent the employees involved in the dispute, and certify the same to the carrier. Upon receipt of such certification the carrier shall treat with the representative so certified as the representative of the craft or class for the purposes of this chapter. In such an investigation, the Mediation Board shall be authorized to take a secret ballot of the employees involved, or to utilize any other appropriate method of ascertaining the names of their duly designated and

authorized representatives in such manner as shall insure the choice of representatives by the employees without interference, influence, or coercion exercised by the carrier. In the conduct of any election for the purposes herein indicated the Board shall designate who may participate in the election and establish the rules to govern the election, or may appoint a committee of three neutral persons who after hearing shall within ten days designate the employees who may participate in the election.

The Board shall have access to and have power to make copies of the books and records of the carriers to obtain and utilize such information as may be deemed necessary by it to carry out the purposes and provisions of this paragraph.

* * * *

Section 3, 45 U.S.C. § 153

§ 153. National Railroad Adjustment Board

First. Establishment; composition; powers and duties; divisions; hearings and awards; judicial review

There is established a Board, to be known as the "National Railroad Adjustment Board", the members of which shall be selected within thirty days after June 21, 1934, and it is provided—

* * * *

(i) The disputes between an employee or group of employees and a carrier or carriers growing out of grievances or out of the interpretation or application of agreements concerning rates of pay, rules, or working conditions, including cases pending and unadjusted on June 21, 1934, shall be handled in the usual manner up to and including the chief operating officer of the carrier designated to handle such disputes; but, failing to reach an adjustment in this manner, the disputes may be referred by petition of the parties or by either party to the appropriate division of the Adjustment Board with a full statement of the facts and all supporting data bearing upon the disputes.

* * * *

(m) The awards of the several divisions of the Adjustment Board shall be stated in writing. A copy of the awards shall be furnished to the respective parties to the controversy, and the awards shall be final and binding upon both parties to the dispute. In case a dispute arises involving an interpretation of the award, the division of the Board upon request of either party shall interpret the award in the light of the dispute.

* * * *

(p) If a carrier does not comply with an order of a division of the Adjustment Board within the time limit in such order, the petitioner, or any person for whose benefit such order was made, may file in the District Court of the United States for the district in which he resides or in which is located the principal operating office of the carrier, or through which the carrier operates, a petition setting forth briefly the causes for which he claims relief, and the order of the division of the Adjustment Board in the premises. Such suit in the District Court of the United States shall proceed in all respects as other civil suits, except that on the trial of such suit the findings and order of the division of the Adjustment Board shall be conclusive on the parties, and except that the petitioner shall not be liable for costs in the district court nor for costs at any subsequent stage of the proceedings, unless they accrue upon his appeal, and such costs shall be paid out of the appropriation for the expenses of the courts of the United States. If the petitioner shall finally prevail he shall be allowed a reasonable attorney's fee, to be taxed and collected as a part of the costs of the suit. The district courts are empowered, under the rules of the court governing actions at law, to make such order and enter such judgment, by writ of mandamus or otherwise, as may be appropriate to enforce or set aside the order of the division of the Adjustment Board: *Provided, however,* That such order

may not be set aside except for failure of the division to comply with the requirements of this chapter, for failure of the order to conform, or confine itself, to matters within the scope of the division's jurisdiction, or for fraud or corruption by a member of the division making the order.

* * * *

Section 5, 45 U.S.C. § 155

§ 155. Functions of Mediation Board

First. Disputes within jurisdiction of Mediation Board

The parties, or either party, to a dispute between an employee or group of employees and a carrier may invoke the services of the Mediation Board in any of the following cases:

(a) A dispute concerning changes in rates of pay, rules, or working conditions not adjusted by the parties in conference.

(b) Any other dispute not referable to the National Railroad Adjustment Board and not adjusted in conference between the parties or where conferences are refused.

The Mediation Board may proffer its services in case any labor emergency is found by it to exist at any time.

In either event the said Board shall promptly put itself in communication with the parties to such controversy, and shall use its best efforts, by mediation, to bring them to agreement. If such efforts to bring about an amicable settlement through mediation shall be unsuccessful, the said Board shall at once endeavor as its final required action (except as provided in paragraph third of this section and in section 160 of this title) to induce the parties to submit their controversy to arbitration, in accordance with the provisions of this chapter.

If arbitration at the request of the Board shall be refused by one or both parties, the Board shall at once

notify both parties in writing that its mediatory efforts have failed and for thirty days thereafter, unless in the intervening period the parties agree to arbitration, or an emergency board shall be created under section 160 of this title, no change shall be made in the rates of pay, rules, or working conditions or established practices in effect prior to the time the dispute arose.

* * * *

Section 204, 45 U.S.C. § 184

§ 184. System, group, or regional boards of adjustment

The disputes between an employee or group of employees and a carrier or carriers by air growing out of grievances, or out of the interpretation or application of agreements concerning rates of pay, rules, or working conditions, including cases pending and unadjusted on April 10, 1936 before the National Labor Relations Board, shall be handled in the usual manner up to and including the chief operating officer of the carrier designated to handle such disputes; but, failing to reach an adjustment in this manner, the disputes may be referred by petition of the parties or by either party to an appropriate adjustment board, as hereinafter provided, with a full statement of the facts and supporting data bearing upon the disputes.

It shall be the duty of every carrier and of its employees, acting through their representatives, selected in accordance with the provisions of this subchapter, to establish a board of adjustment of jurisdiction not exceeding the jurisdiction which may be lawfully exercised by system, group, or regional boards of adjustment, under the authority of section 153 of this title.

Such boards of adjustment may be established by agreement between employees and carriers either on any individual carrier, or system, or group of carriers by air and any class or classes of its or their employees; or pending the establishment of a permanent National Board of Ad-

justment as hereinafter provided. Nothing in this chapter shall prevent said carriers by air, or any class or classes of their employees, both acting through their representatives selected in accordance with provisions of this subchapter, from mutually agreeing to the establishment of a National Board of Adjustment of temporary duration and of similarly limited jurisdiction.